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Interactive dialogue with experts on the implementation and realization of the right to development, including the implications of the 2030 Agenda for Sustainable Development, and a possible engagement with the high-level political forum

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The extraterritorial legal obligations of States and the responsibility of business enterprises for the realization of economic, social and cultural rights

I. Introduction: a right to development-friendly understanding of investment promotion

1. **Improving the regulation of transnational corporations has a key role to play in fulfilling the SDGs, particularly in poverty reduction and in promoting prospertity, on which the High-Level Political Forum shall focus in 2017.** Indeed, Goal 17 includes targets that relate to foreign direct investment and to the contribution of investment to growth (17.1 : Strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection, 17.3 : Mobilize additional financial resources for developing countries from multiple sources, to which an indicator (17.3.1) on levels of foreign direct investment is associated, 17.5 Adopt and implement investment promotion regimes for least developed countries).

However, it is important to acknowledge that, **whereas increased levels of FDI flows to developing countries (LDCs in particular) can make a contribution to the fulfilment of human rights in general and to the right to development in particular, whether or not they shall have such a positive impact depends on the nature of the strategies deployed to attract FDI**. Already in 2006, referring to MDG8 on a global partnership for development, the Working Group on the Right to Development stated that the right to development 'implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development, ..., further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development'.[1]

2. It is therefore key to ensure that the environment under which TNCs operate supports, rather than undermines, the right to development: increasing FDI cannot be an end in itself, but only a means to an end. A recent publication by the South Centre highlighted, for instance, that a number of myths surround FDI and its contribution to capital accumulation, technological progress, and growth. As summarized by that publication :

> First, FDI is more about transfer and exercise of control than movement of capital. It does not always involve flows of financial capital (movements of funds through foreign exchange markets) or real capital (imports of machinery and equipment for the installation of productive capacity). Second, only the so-called greenfield investment makes a direct contribution to

* The author expresses himself in his personal academic capacity, and his views cannot be attributed to the Committee as a whole.
[1] Report of the Working Group on the Right to Development. 7th session (conclusions) E/CN.4/2006/26, para. 59.

> productive capacity and involves cross-border movement of capital goods, but it is not easy to identify from reported statistics what proportion of FDI consists of such investment as opposed to transfer of ownership of existing assets. Third, what is commonly reported as FDI contains speculative and volatile components. Fourth, the longer-term impact of FDI on the balance of payments is often negative even in countries highly successful in attracting export-oriented FDI. Finally, positive technological spillovers from FDI are not automatic but call for targeted policies of the kind that most investment agreements prohibit.[2]

The impacts of FDI on growth depend to a significant extent on local conditions, that may or may not allow a country to benefit, in terms of sustainable growth, from the arrival of FDI.[3] Moreover, some of the strategies that are currently used to attract FDI are in fact self-defeating. There is ample evidence for instance that "tax holidays" or even, more generally, legal protections granted to investors, have little or no impact on the ability of the country to attract investment, but may significantly reduce domestic policy space.[4] The major determinants of foreign direct investment (FDI) are economic factors such as market size and trade openness, as measured by exports and imports in relation to total GDP.[5] For other variables there is less consensus in the literature. In general, the studies find that the political and economic factors such as market size, skilled labor and trade policies are more important for the locational decision of foreign investment than the legal structure for protection of investors' rights and the ability to avoid double taxation by double-taxation treaties.[6]

3. In other terms, if there is one means through which revenues from taxation could increase rather painlessly (and at a relatively low administrative cost), it is by raising the taxes owed by foreign corporations operating in the country, or by closing loopholes, such as price transfer mechanisms, allowing such corporations to escape local taxes, if not entirely, at least to a very large extent. However, States (particularly LDCs) currently fear to resort to this strategy, because they are concerned that investors will not be attracted to the country if they impose excessively high requirements. For the same reason, these States routinely enter into investment agreements that prohibit "performance requirements", although such requirements imposed on investors could

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[2] Yilmaz Akyüz, *Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities* (South Centre Research Paper 63)(October 2015) (abstract).

[3] See, for instance, Laura Alfaro, Areendam Chanda, Sebnem Kalemli-Ozcan, and Selin Sayek, 'FDI and Economic Growth, The Role of Local Financial Markets', *Journal of International Economics*, vol. 64 (2004), 113-134 (showing that that only countries with well-developed financial markets gain significantly from FDI in terms of their growth rates) ; or Borensztein, E., J. De Gregorio, and J-W. Lee, 'How Does Foreign Direct Investment Affect Economic Growth?', *Journal of International Economics*, vol. 45 (1998), 115-135 (emphasizing the role of human capital in maximizing the growth potential of the arrival of FDI).

[4] For a more systematic treatment, see Olivier De Schutter, Johan F. Swinnen and Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development', in O. De Schutter et al. (eds), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements*, Routledge, London and New York, 2012, pp. 1-24. On the notion of "policy space", see Jörg Mayer, "Policy Space: What, For What, and Where?", 27 Development Policy Review 373-95 (2009) (originally presented as UNCTAD Discussion Paper No. 191, UN Doc. UNCTAD/OSG/DP/2008/6 (October 2008)). Mayer distinguishes "*de jure* sovereignty, which involves the formal authority of national policy-makers over policy instruments, and *de facto* control, which involves the ability of national policy-makers to effectively influence specific targets through the skilful use of policy instruments' and he defines national policy space as "the combination of *de jure* policy sovereignty and *de facto* national policy autonomy" (at p. 376). This notion was pioneered by Richard N. Cooper, *The Economics of Interdependence: Economic Policy in the Atlantic Community*. New York: McGraw Hill for the Council on Foreign Relations, 1968. See also Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*, World Bank Policy Research Paper WPS 3121, World Bank: Washington DC, 2003.

[5] A greater emphasis has been placed in recent years on the latter determinant as a result of globalization and the development of global supply chains. Even in this regard, however, the relationship is by no means automatic, as illustrated by the situation of Sub-Saharan African countries that are very open to trade but that nevertheless are generally not able to attract FDI.

[6] The economic empirical literature confirms the suspicion expressed by some in the legal literature (M. Sornarajah, 'State responsibility and bilateral investment treaties', *Journal of World Trade Law*, vol. 20 (1986), pp. 79–98; Jason Webb Jackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence', *Virginia Journal of International Law*, vol. 51 (2011), p. 397): there is weak evidence that the conclusion of investment agreements guaranteeing extensive rights to investors has more than a marginal impact on FDI inflows, and where it does seem to have some effect, it is mostly as a substitute for poor institutional quality, particularly in Sub-Saharan African countries or in transition economies swiftly moving towards open market policies.

significantly strengthen the links with the local economy and thus support local development efforts. **A reading of SDG 17 informed by the right to development requires creating an international environment in which countries would face fewer incentives to resort to beggar-thy-neighbour policies in order to attract foreign investors. Improved international assistance and cooperation for the regulation of investors has a major play to in this regard.**

II. SDGs and the United Nations business and human rights agenda: the state of play

4. Currently, three processes are advancing in parallel within the UN system, that address the relationship between human rights and transnational corporations and other business enterprises, and thus seek to improve the contribution of TNCs to SDGs by ensuring that TNCs operate under an appropriate legal and policy framework :

a) The **Guiding Principles on Business and Human Rights**, as developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, were endorsed by the Human Rights Council in June 2011.[7] The Guiding Principles describe the implications of the duty of States to protect human rights; of corporations' responsibility to respect human rights, including by practicing due diligence -- seeking information about the human rights impacts of their activities and acting on the basis of that information --; and of the need to ensure access to remedies of human rights abuses that have their source in corporate conduct.

b) An open-ended intergovernmental working group (IGWG) was established by the Human Rights Council with a view to elaborating **a new "internationally legally binding instrument on Transnational Corporations (TNCs) and Other Business Enterprises with respect to human rights"**, in accordance with the terms of the resolution adopted by the Council on 24 June 2014.[8] The IGWG held its first two exploratory sessions in October 2015 and in October 2016. It should be presented with elements for its third session, that shall be convened in October 2017.

c) **Human rights treaty bodies and the Special Procedures of the Human Rights Council** have gradually developed an understanding of States' obligations to protect human rights, and of the implications as regards the regulation of TNCs.[9] Under the International Covenant on Civil and Political Rights, the Human Rights Committee takes the view that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[10] This is also the position adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights.[11] Various human rights treaty bodies have adopted statements or general comments directly focused on the impacts of corporations on human rights: for instance, the Committee on Economic, Social and Cultural Rights dedicate a Statement in 2011 to State obligations related to corporate responsibilities in the context of the Covenant rights,[12] and it is now preparing a General Comment on State obligations under the International Covenant on Economic, Social and

[7] HRC Res. 17/4 (16 June 2011). For a critical appraisal, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business. Beyond the Corporate Responsibilty to Respect?* (Cambridge: Cambridge Univ. Press, 2013).
[8] Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN doc. A/HRC/26/L.22/Rev.1.
[9] See for a systematic exposition O. De Schutter, *International Human Rights Law* (Cambridge Univ. Press, 2nd ed. 2014), 427-526.
[10] Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 8.
[11] Committee on Economic, Social and Cultural Rights, *General Comment No. 12 (1999): The right to adequate food (Art. 11)*, UN doc. E/C.12/1999/5, para. 15 ('The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food').
[12] E/C.12/2011/1 (Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights).

Cultural Rights in the context of Business Activities; in 2016, the Committee on the Rights of the Child adopted a General Comment on the same issue.[13]

Although they have sometimes been presented as competing against one another, these processes are in fact largely complementary. The Guiding Principles on Business and Human Rights were explicitly intended to provide "concrete and practical recommendations" to States and companies about how to operationalize the "protect, respect, remedy" framework which the Human Rights Council had endorsed in 2008 in its resolution 8/7. Yet, as they state as part of their "General Principles": "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights." In other terms, the GPs were never intended to halt the development of international human rights law, or to be a substitute for the obligations imposed on States under the international human rights they are parties to.

5. There is one area in particular where the Guiding Principles appear to set the bar below the current state of international human rights law: that concerns the extraterritorial human rights obligations of States, including, in particular, the duty of States to control the corporations they are in a position to influence, wherever such corporations operate. The Guiding Principles do provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (Principle 2). Though this includes operations abroad, the Commentary to the Guiding Principles qualifies this principle by stating:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.
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> There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support.

In contrast to this position, the United Nations treaty bodies have repeatedly expressed the view that States should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should "prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".[14] Specifically in regard to corporations, this Committee has further stated that: 'States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant'.[15] Similar views have been expressed by other human rights treaty bodies. The Committee on the Elimination of Racial Discrimination considers that State parties should also protect human rights by preventing their own citizens and

[13] CRC/C/GC/16 (General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights).

[14] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (26 November 2002), para. 31.

[15] Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1 (20 May 2011), para. 5.

companies, or national entities from violating rights in other countries.[16] Under the International Covenant on Civil and Political Rights, the Human Rights Committee noted in 2012 in Concluding Observations addressed to Germany:

> The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.[17]

It is noteworthy that these statements, while they confirm the views of the human rights treaty bodies that these bodies had expressed in the past, were reiterated after the endorsement by the Guiding Principles on Business and Human Rights by the Human Rights Council.

III. The contribution of the Working Group on the Right to Development to the High-Level Political Forum on the issue of transnational corporations and other business enterprises and the right to development

6. Against that background, how could the Working Group on the Right to Development most effectively contribute to the discussions within the High-Level Political Forum, on the implementation of SDG 17 ? It is suggested that it could propose two priorities in this regard.

1. Access to effective judicial remedies for victimes of business-related human rights abuses in a transnational context: a duty of international assistance and cooperation

7. A first priority is to shape an international environment supporting each State's efforts to control TNCs operating within its jurisdiction, in order to ensure that such actors contribute to the fulfilment of economic, social and cultural rights. This has implications as regards the extraterritorial obligations of States, at two levels : it concerns both (i) the impacts, outside their national territories, of the measures States adopt individually, and (ii) State obligations of a global character, related to the collective action of States in global and regional partnerships.[18]

8. (i) At the first level, States are expected, consistent with their existing human rights obligations, to control the conduct of corporations over which they may exercise an influence, wherever such corporations operate. In practice, and in order to avoid any controversy concerning the legitimate scope of extraterritorial jurisdiction of States, this means imposing on corporations that are domiciled under the State's jurisdiction (whether they are incorporated within the State, or whether they have located their statutory seat or their principal place of business within the territory of that

[16] See Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18, para. 17; Concluding Observations: United States, CERD/C/USA/CO/6, para. 30.
[17] CCPR/C/DEU/CO/6, par. 16.
[18] The distinction between these two levels is borrowed from the attempt to codify international human rights law as regards the extraterritorial obligations of States in the area of economic, social and cultural rights, made by the Maastricht Principles on the Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, adopted in September 2011 by a range of academic experts and institutions and non-governmental organizations : see Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, O. De Schutter et al., 34 Human Rights Quarterly 1084 (2012). Principle 8 of the Maastricht Principles states that "extraterritorial obligations encompass: a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally". The High-Level Task Force on the Implementation of the Right to Development also noted that the right to development implied three levels of States' responsibility, including (i) States acting collectively in global and regional partnerships; (ii) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (iii) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction (High-Level Task Force on the Implementation of the Right to Development, Right to Development Criteria and Operational Sub-Criteria, A/HRC/15/WG.2/TF/2/Add.2 (8 March 2010), Annex).

State) not only that they respect human rights, but also that they act with due diligence to ensure that their subsidiaries or business partners (suppliers and franchisees) comply. Far from interfering with the sovereignty of the State under the jurisdiction of which such subsidaries are established or on the territory of which these business partners operate, the home State discharging thus its obligation to protect human rights would strengthen the ability for the host State to effectively enforce the regulatory measures adopted by that State in the name of public health, a healthy environment, workers' rights, or the rights of local communities.

In practice, this obligation translates into the establishment of appropriate remedies, guaranteeing effective access to justice for victims of business-related human rights abuses in a transnational context. A number of obstacles remain in this regard, however: they relate, for instance, to the existence of collective redress mechanisms in mass tort litigation; to the admissibility of evidence collected abroad; to the availability of legal aid; or, unless parent-company direct liability is organized (as it is for instance under the recently adopted French law on due diligence), to the restrictive conditions under which the corporate veil may be lifted.[19] States are encouraged to remove this obstacles, following the recommendations made in the report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse,[20] which the Human Rights Council welcomed in 2016 at its 32nd session. By facilitating access to justice for victims of transnational corporate human rights abuses, States would be facilitating the efforts of the host State to regulate the activities of business enterprises which may affect the enjoyment of human rights. Indeed, the availability of remedies in the home State of the multinational group may create the right incentives in the host State. The host State would be encouraged to strengthen the regulatory framework and access to remedies, and there would be less pressure on that State to allow violations to remain unaddressed because of a fear that foreign investors might find the location less attractive if they are imposed strong requirements to comply with human rights.

9. (ii) At the second level, States could be encouraged to coordinate their efforts more fully, in order to ensure that any impunity for human rights violations by TNCs is effectively addressed. In order to tackle such impunity, States may have to cooperate where the activities of the transnational corporation cross borders for the collection of evidence, for the freezing or seizure of assets, or for the execution of judgments. The current negotiation of a new legally binding instrument on business and human rights provides an opportunity to deepen such cooperation, if it could lead to a treaty on legal mutual assistance being adopted.[21] However, there is no need to prejudge the outcome of the current negotiations on such a new instrument. In a resolution on "Business and human rights: improving accountability and access to remedy", adopted at its 32nd session in June 2016, the Human Rights Council expressed its concern at the "legal and practical barriers to remedies for victims of business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy, including through judicial and non-judicial avenues".[22] Referring to the above-mentioned report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse, the resolution further

> *[E]ncourages* States to take steps to improve the effectiveness of international cooperation between State agencies and judicial bodies with respect to law enforcement of domestic legal regimes to address business-related human rights abuses;
> *Invites* regional and international bodies responsible for promoting and facilitating international cooperation with respect to cross-border investigation, legal assistance and enforcement of

[19] See G. Skinner, R. McCorquodale and O. De Schutter*, The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business*, International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice (ECCJ), December 2013.
[20] A/HRC/32/19 and Add.1.
[21] O. De Schutter, "Towards a New Treaty on Business and Human Rights", *Business and Human Rights Journal*, vol. 1 (2015) pp. 41-67.
[22] Preamble, para. 5.

judicial decisions to take steps to improve the speed and effectiveness of such cooperation in cross-border cases of business-related human rights abuses through legal, practical and capacity-building means.[23]

Therefore, any progress towards improved cooperation between States for the enforcement of human rights duties in the context of transnational corporate human rights abuses should be seen as a contribution towards the establishment of an international legal order in which human rights can be fully realized, as required under Article 28 of the Universal Declaration of Human Rights[24] and the right to development.[25]

2. Ensuring the primacy of human rights over investors' rights

10. A second priority is to ensure that human rights obligations are given priority over investors' rights, whenever a risk of conflict occurs. As noted above, States have routinely concluded bilateral or multilateral trade or investment agreements including provisions protecting on investors' rights, in order to attract FDI.[26] In general, these treaties pertain to admission of investment (defining the conditions of entry of FDI into the country); they protect investors from various forms of expropriation, both direct and indirect (the latter often under the requirement of a "fair and equitable treatment"); they include guarantees of "national treatment" (according to which investors enjoy a treatment similar to that enjoyed by the nationals of the host State) and "most-favored nation" (according to which they enjoy treatment similar to the best treatment accorded to investors from any other country), as well as provisions allowing the transfer and repatriation of profits (capital transfer provisions); and they have dispute settlement clauses allowing investors to challenge measures taken by the host State before international arbitral tribunals designated as competent to settle disputes between the investors covered by the treaty and the host State, established under the rules of the 1965 International Convention on the Settlement of Disputes between States and the nationals of other Parties (ICSID)[27] or under the UNCITRAL Arbitral Rules.[28] It is in order to ensure that the negotiation and conclusion of such treaties do not undermine human rights that this author has proposed, in his official capacity as Special Rapporteur on the right to food, the systematic preparation of human rights impact assessments in the course of such negotiations, according to a methodology that was presented at the nineteenth session of the Human Rights Council in March 2012.[29]

11. Because investment treaties (or provisions on investors' rights in trade agreements) protect investors from the adoption of regulations that amount to indirect expropriation, situations may arise in which the rights of investors are pitted against those of the individuals or communities whose rights are negatively affected by the investment -- which is why the Guiding Principles on Business and Human Rights insist that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts". The Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises notes in his commentary that :

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[23] OP 5 and 6.
[24] GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948) (Art. 28).
[25] GA res A/RES/41/128, 4 December 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc A/RES/41/53 (1986).
[26] For a more detailed discussion, see Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague and Boston, Martinus Nijhoff, 1995); or Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', in Olivier De Schutter (ed), *Transnational Corporations and Human Rights*, Hart Publ., Oxford and Portland, Oregon, 2006, chap. 3.
[27] 575 U.N.T.S. 159.
[28] The Arbitral Rules adopted by the United Nations Commission on International Trade Law (UNCITRAL) were adopted initially on 28 April 1976; they were revised in 2010. These Rules provide a comprehensive set of procedural rules upon which parties to disputes between States and foreign investors may agree for the conduct of arbitral proceedings.
[29] See Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food: Addendum, UN doc. A/HRC/19/59/Add.5 (19 December 2011).

> Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.[30]

Similarly, the Committee on Economic, Social and Cultural Rights has urged that human rights principles and obligations be fully integrated in negotiations related, for instance, to investment treaties.[31]

12. Where investment agreements are insufficiently explicit about the right of the State to regulate foreign investors in order to ensure full compliance with the State's human rights obligations, as such obligations may evolve from time to time in the name of progressive realization, there is a need to ensure that these human rights obligations are fully taken into account in investor-State dispute settlement proceedings.

13. How this can be relevant is illustrated in the recent case of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* presented for resolution to an arbitral tribunal established under the International Centre for Settlement of Investment Disputes. In this case, the claimant companies had established a subsidiary in Argentina (Aguas Del Gran Buenos Aires S.A. (AGBA)) which was awarded a concession for water and sewage services to be provided in the Province of Greater Buenos Aires. However, AGBA faced a number of obstacles, which allegedly "rendered the efficient and profitable operation of the Concession extremely difficult", culminating in the devaluation of the peso in January 2002: although the peso had lost two thirds of its value, AGBA failed to obtain a renegotiation of the tariffs it was allowed to impose under the concession contract.[32] The concession contract was finally terminated in 2006. Before the ICSID tribunal, the claimaints sought compensation for a total amount of 316 million USD under the Argentina-Spain BIT.[33]

Before the tribunal, the Argentinian government argued inter alia that it could not set aside its duties towards its population, to provide water at an affordable price. It stated that "under the Concession Contract and the applicable Regulatory Framework, Claimants assumed investment obligations. Furthermore, these obligations gave rise to bona fide expectations that those investments would indeed

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[30] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie - Guiding Principles on Business and Human Rights, UN doc. A/HRC/17/31 (21 March 2011), principle 9. The Principles were endorsed by the Human Rights Council in its Resolution 17/4, U.N. doc. A/HRC/RES/17/4 (16 June 2011).

[31] See, e.g., Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November- 3 December 1999 (E/C.12/1999/9); Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11),* E/C.12/1999/5, at paras. 19 and 36 ('States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention'); Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* U.N. Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water").

[32] ICSID Case No. ARB/07/26, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, Award of 8 December 2016, para. 34.

[33] Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991

be made and would make it possible to guarantee, in the area in question, the basic human right to water and sanitation. By failing to make the investments they had undertaken to make, Claimants violated the principles of good faith and pacta sunt servanda that are recognized both by Argentine law and by international law. Such failure did not only affect mere contractual provisions, but basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty".[34] Argentina argued that the Universal Declaration of Human Rights imposes obligations not exclusively on States, but also on private parties.[35] Underlining that it had committed to guaranteeing the right to water and sanitation under the International Covenant on Economic, Social and Cultural Rights,[36] it presented this right as "a fundamental right that the leading companies of the world have adopted in the Global Compact as being part of their corporate social responsibility",[37] and that would impose direct obligations on companies.

In response, the claimants stated that "the Argentine Republic would be the “true guarantor” of human rights and that such rules, as they are part of international law, are directly binding on States but not on private parties. ... guaranteeing the human right to water is a duty of the State, not of private companies like the Claimants".[38] The Spain-Argentina BIT, it argued, "adopts the classical asymmetric model that exclusively regulates State obligations [and] does not impose obligations upon the investor".[39]

The arbitral tribunal rejects this latter view. It finds instead that investor-State dispute settlement procedures are established precisely because States have certain rights that may prevail over those of the investor, requiring that the tribunal arbitrate between these conflicting rights.[40] The tribunal also agrees with Argentina that general international law is relevant to the adjudication of the dispute between the parties: the Spain-Argentina BIT, in other terms, cannot be read in isolation from international law.[41] Finally, it considers outdated the view according to which "corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law"[42]: citing the Guiding Principles on Business and Human Rights, it notes that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation".[43] The tribunal concludes that the classic view according to which, since they are not subjects of international law, corporations cannot be imposed obligations under international human rights law, is untenable as a general statement[44]; quite to the contrary, "the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights".[45]

Yet, although the Spain-Argentina BIT must be interpreted in the light of this requirement (the treaty "cannot be interpreted and applied in a vacuum"[46]), international human rights law does not result in imposing direct obligations on corporations ; nor does the Concession contract result in shifting from the State to the company the burden of ensuring the right to water and sanitation: "The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation

[34] *Urbaser S.A. et al.,* cited above, para. 1156.
[35] Id., para. 1159.
[36] Id., para. 1160.
[37] Id., para. 1161.
[38] Id., para. 1157.
[39] Id., para. 1167.
[40] Id., paras. 1186-1187.
[41] Id., paras. 1188-1192.
[42] Id., para. 1194.
[43] Id., para. 1195.
[44] Id., para. 1196.
[45] Id., para. 1199.
[46] Id., para. 1200.

would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services".[47] Citing General Comment No. 15 (2002) on the right to water and sanitation adopted by the Committee on Economic, Social and Cultural Rights, the arbitral tribunal notes that it is the State's duty, *inter alia*, to create accountability mechanisms ensuring that this right is fully guaranteed, but that in the absence of any specific performance requirement imposed by the State, corporate actors do not have the same duties to provide. In sum, the right to water and sanitation "is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law".[48] Only negative duties (to abstain from infringing the right to water and sanitation) could be of "immediate application" to private parties.

14. Though the outcome will disappoint some observers, the *Urbaner* litigation does illustrate a strong tendency to integrate human rights in the interpretation of investment agreements, in order to overcome the fragmentation of international law and to achieve greater coherence between different bodies of law. This is an evolution the Working Group on the right to development may seek to encourage, by suggesting that the investment frameworks and investment promotion regimes explicitly take into account the duties of States to comply with international human rights.

[47] Id., para. 1208.
[48] Id., para. 1210.